

BARBARA NONDO  
versus  
WILFRED TAURAYI CHIHWANYA

HIGH COURT OF ZIMBABWE  
TAKUVA & WAMAMBO JJ  
HARARE 2 November 2023 & 2 October 2024

### Civil Appeal

*Appellant in person*  
*R Murambasvina*, for the respondent

WAMAMBO J: This is an appeal against a judgment by a Magistrate sitting at Gokwe Magistrates Court. The plaintiff and defendant in the court *a quo* are the appellant and respondent respectively in this appeal. The parties were in an unregistered customary union.

In the Magistrate's ruling he granted an order in the following terms.

"1. The plaintiff's claim is granted and the property is hereby shared as follows:

#### PLAINTIFF

1 x bed mattress  
20 x 20L plastic buckets  
2 x 20L buckets with taps  
3 x washing buckets  
2 x iron dishes  
2x bedding sheets  
4 x blankets  
1 x hooper inverter  
1 x satellite dish  
1 x speaker  
1 x Tv stand  
4 x stools  
All kitchen utensils  
8 \* Zinc roofing sheets

#### DEFENDANT

12 x zinc roofing sheets  
3 x doors  
2 x reinforcement iron rods  
2 x brick force bundles  
4 kgs roofing sheets  
1 x pick  
1x hacksaw blade  
1 x wheelbarrow  
1 x shovels  
Plough and chain  
8 x window latches  
2 x door frames  
2 x 6 pane window panes

1\*door

4 x ND 4 window frames

PLAINTIFF

DEFENDANT

1 solar panel

7 chairs

1x reinforcement iron rod

1x plastic drum

2x door frames

2 x 3 pane window frames

DvD player, speaker, hooper

4x garden chairs 8 tables

(a) Each party to bear its costs”

Unhappy with the distribution of the property as per the order above appellant filed an appeal with this Court. The first notice of appeal was later substituted with an amended notice of appeal. Five grounds of appeal were raised by the appellant. Although the amended notice of appeal ADDS more flesh to the grounds they remain basically the same as the initial grounds of appeal.

The amended grounds of appeal are couched as follows:

“1. The learned magistrate erred when he stated that the appellant had no witnesses when in actual fact the appellant had indicated that she had her father as a witness. The witness was waiting to be called from outside and the presiding officer ignored to summon such witness and proceeded to allow the respondent to call his witness.

There are court processes and procedures. The appellant could not have just burst about calling her witness. During the self re – examination the appellant clearly stated that she had a witness. It is a wonder how the Learned Magistrate determined the relevance of the witness testimony and impact, when in fact the testimony was not given.

2. The Honourable magistrate grossly erred when in his ruling he indicated that the plaintiffs (Appellant) claim had been granted but went on to share the property in accordance to the defendant’s (respondent) plea save for just a few petty items. The concept of just and equitable was misdirected.

3. The Honourable Magistrate a quo also grossly erred and misdirected itself when it failed to share the goats, cattle and building materials which the appellant had claimed. This is so despite that the appellant’s claim had been granted. The learned Magistrate did not address this issue on record.

4. The learned Magistrate Court grossly erred and misdirected itself on a point of fact when it accepted, the respondent and his witness conflicting statements that the parties do not own any cattle and goats.

5. The Honourable Court erred when it failed to put into consideration the fact that the property awarded to the appellant is her sole and personal property, she bought during the 15 years period when the respondent deserted her after falling pregnant. The Court could therefore have awarded the appellant a share of the matrimonial acquisition basing on the concept of unjust enrichment. The appellant proved

that she contributed directly and indirectly through farming and selling second hand clothes and as a helper to the respondent when performing his duties as a prophet. Some of the clients, would stay at the parties home for weeks. The respondent is living in a world of fantasy where the spirits would direct him to buy property which is not subject to sharing”

Appellant seeks that the judgment of the Court *a quo* be set aside and the property “shared according to s11 of plaintiff’s particulars of claim”.

The grounds of appeal were clearly convoluted. They are long, winding and argumentative. They are no as clear and concise as would be preferred.

We however note that the grounds of appeal were drafted by a lay person. Indeed, both parties were unrepresented during the trial.

For purposes of finality to the apparently simple dispute we chose to deal with the merits of the matter.

I will presently deal with the grounds of appeal.

#### Ground one

In response to this ground of appeal the trial Magistrate said:

“ 1. Ad Para 1

The appellant had the duty to call a witness if she had any. She was not barred from calling the witness. Further the relevance of the witness testimony and impact on the case has not been shown.”

A reading of the record reflects that when appellant raised the issue of calling her father as a witness the Trial Magistrate asked her a number of questions. The appellant conceded that the issue of building materials being there was not in dispute. It follows that the witness sought to be called would testify on an issue that was common cause. That would not assist appellant or the justice of the case.

I find this “ground” unmeritorious and dismiss it.

#### Ground two

This “ground” relates to semantics and a misunderstanding of the Magistrates ruling in my view.

By the very nature of the matter appellant (who was the plaintiff) is the one who issued summons. She is the one who brought forth a claim. The claim had to be granted or dismissed. That the Magistrate said it is granted without indicating that it was granted in part is of no moment I find this “ground” hair splitting and indeed unmeritorious and I dismiss it.

#### Ground three

The last portion of this ground speaks to ground two. My findings on ground two are thus applicable thereto.

The question in issue is whether or not the trial Magistrate failed to share the goats, cattle and building materials claimed by the appellant.

The challenge with this ground of appeal is that it does not specify which building materials were not shared by the Magistrate. I note that in the Magistrate's order there are some building materials that are included namely roofing sheets, doors, brickforce bundles, window, latches, and window frames. It means we have to advert to the particulars of claim with a fine tooth comb to enumerate if any of the building materials were not considered.

On its own the term building materials is very broad in any case.

In response to this ground of appeal the trial Magistrate responded as follows:

“Ad Para 3:

The claim for goats and cattle was not proved on a balance of probabilities. The building material was shared as per the judgment of the Court.

not *a quo* n the Magistrate's judgment he found that the goats and chicken claim was not proved”

The respondent's evidence reflects that he testified to the effect that he sold the goats to pay for appellant's medication, after she was injured on her hand.

The evidence on the goats as given by respondent was no questioned in cross examination on the issue of the goats.

The respondent's evidence was that he bought a beast and sold it. Appellant is the one who is claiming that the parties bought cattle during their union. She failed to prove that the said cattle if any are still owned by the parties.

The Magistrate was correct not to distribute property that was not proven to be owned by the parties. The third ground falls away and is dismissed.

#### Ground four

I have already found in ground three that the goats and cattle were not proven to be part of the property owned by the parties. On this ground I will closely consider the respondent's witness evidence.

The witness is Clever Shamhu, When asked if respondent has any goats or cattle his response was negative. In cross examination when it was put to him that respondent bought a beast through him, he disagreed. Respondent's evidence however was to the effect that he purchased goats from his witness. He never testified about buying cattle from his

witness, He as adverted to earlier said he sold the goats to raise money to pay for the debts he incurred when he purchased medication for appellant.

The witness respondent refers to in his evidence in chief is not named. Assuming that witness is Clever Shamhu, Clever testified that there are no longer any goats.

In cross- examination he said

“you never gave me the money to buy beasts but you gave goats and you later collected the goats”

In an apparent typographical error the sentence, read as it stands however is to the effect that goats were ultimately collected by appellant after he was given money for the goats. If Clever Shamhu had the goats for safekeeping the evidence reflects that the said goats were later collected from him. If they were collected respondent testified that they were sold. Both Clever and respondent are ultimately agreed that respondent no longer has any goats and that there are no beasts belonging to respondent at the witness home.

In the circumstances, I find this ground unmeritorious and dismiss it.

The fifth ground of appeal takes the cake for verbosity and argumentativeness. It amounts on the most part to raising new facts that were never placed on record during the trial. Ground five loses sight of the fact that the property which was distributed by the trial Court was in the first place brought to the fore through appellant’s particulars of claim. The trial Court did not pluck the property from the air and then distributed it.

In any case there was no evidence led by appellant to the effect that the distributed property was amassed by her after the dissolution of the unregistered customary law union.

I find that the trial court was correct in its findings. The distribution of the property clearly took into account all the circumstances of the case. The trial Court found that by claiming 100% contribution to the acquisition of the property respondent wanted to “act smart” and “hide behind what the spirit directed him to do”. The court correctly found that all the property jointly acquired is subject to sharing.

The evidence reflects that respondent performs divination services for a fee while appellant is a vendor who worked in the fields and sold produce therefrom.

I find in the circumstances that the appeal has no merit and stands to be dismissed. I see no need to mulct appellant with costs. From the onset respondent sought that each party should bear its own costs. I also note that appellant was a self, actor throughout. In employing the judicial discretion bestowed upon the court we find that an order that each party should bear its own costs meets the justice of this case.

It is ordered as follows:

The appeal be and is hereby dismissed with each party paying its own costs.

TAKUVA J..... agrees

Appellant in person

*R Murambasvina Law Chambers*, respondents legal practitioners